

AMENDED IN SENATE JUNE 19, 2013

AMENDED IN ASSEMBLY MAY 8, 2013

AMENDED IN ASSEMBLY APRIL 9, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 227

Introduced by Assembly Member Gatto
(~~Coauthor: Assembly Member~~ *Coauthors: Assembly Members Alejo,*
***Hagman, Logue, and Muratsuchi*)**

February 4, 2013

An act to amend Section 25249.7 of the Health and Safety Code, relating to toxic substances, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 227, as amended, Gatto. Proposition 65: enforcement.

(1) The existing Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from knowingly discharging or releasing such a chemical into water or any source of drinking water, except as specified. The act imposes civil penalties of not more than \$2,500 per day upon persons who violate those prohibitions, and provides for the enforcement of those prohibitions by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest. The act requires any person bringing an action in the public interest, or any private person filing an action in which a violation of the act is alleged, to notify the Attorney

General, the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and the alleged violator that such an action has been filed.

This bill would prohibit an enforcement action from being filed by a person in the public interest, and would prohibit the recovery of certain payments or reimbursements, if the notice to the alleged violator alleges a failure to provide a clear and reasonable warning for certain specified exposures, *including a notification that an alleged violator may not be liable if the business has fewer than 10 employees*, and, within 14 days after receiving the notice, the alleged violator corrects the alleged violation, pays a civil penalty in the amount of \$500 per facility or premises, and serves on the person who sent the notice a specified written statement, signed under penalty of perjury, *subject to the limitation that the alleged violator may correct the violation, pay the civil penalty, and serve a correction notice on the person who served notice of the violation only one time for a violation arising from the same exposure in the same facility or on the same premises*. Since the commission of perjury is a crime, the bill would impose a state-mandated local program by creating a new crime.

The bill would require a person who brings an action in the public interest and serves a notice of an alleged violation for those exposures to include certain information in the notice ~~and would provide, if there is a dispute over whether an action is prohibited under the provisions added by the bill, that the alleged violator bears the burden of proving the applicability of those provisions.~~

(2) Proposition 65 provides that it may be amended by a statute, passed in each house by $\frac{2}{3}$ vote, to further its purposes.

This bill would find and declare that it furthers the purposes of Proposition 65 and would make other findings regarding the purposes of the bill. The bill would declare that a specified provision of the bill is independent and severable from the other changes made by this bill.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(4) This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 25249.7 of the Health and Safety Code
2 is amended to read:

3 25249.7. (a) A person who violates or threatens to violate
4 Section 25249.5 or 25249.6 may be enjoined in any court of
5 competent jurisdiction.

6 (b) (1) A person who has violated Section 25249.5 or 25249.6
7 is liable for a civil penalty not to exceed two thousand five hundred
8 dollars (\$2,500) per day for each violation in addition to any other
9 penalty established by law. That civil penalty may be assessed and
10 recovered in a civil action brought in any court of competent
11 jurisdiction.

12 (2) In assessing the amount of a civil penalty for a violation of
13 this chapter, the court shall consider all of the following:

14 (A) The nature and extent of the violation.

15 (B) The number of, and severity of, the violations.

16 (C) The economic effect of the penalty on the violator.

17 (D) Whether the violator took good faith measures to comply
18 with this chapter and the time these measures were taken.

19 (E) The willfulness of the violator's misconduct.

20 (F) The deterrent effect that the imposition of the penalty would
21 have on both the violator and the regulated community as a whole.

22 (G) Any other factor that justice may require.

23 (c) Actions pursuant to this section may be brought by the
24 Attorney General in the name of the people of the State of
25 California, by a district attorney, by a city attorney of a city having
26 a population in excess of 750,000, or, with the consent of the
27 district attorney, by a city prosecutor in a city or city and county
28 having a full-time city prosecutor, or as provided in subdivision
29 (d).

30 (d) Actions pursuant to this section may be brought by a person
31 in the public interest if both of the following requirements are met:

32 (1) The private action is commenced more than 60 days from
33 the date that the person has given notice of an alleged violation of
34 Section 25249.5 or 25249.6 that is the subject of the private action
35 to the Attorney General and the district attorney, city attorney, or
36 prosecutor in whose jurisdiction the violation is alleged to have
37 occurred, and to the alleged violator. If the notice alleges a
38 violation of Section 25249.6, the notice of the alleged violation

1 shall include a certificate of merit executed by the attorney for the
2 noticing party, or by the noticing party, if the noticing party is not
3 represented by an attorney. The certificate of merit shall state that
4 the person executing the certificate has consulted with one or more
5 persons with relevant and appropriate experience or expertise who
6 has reviewed facts, studies, or other data regarding the exposure
7 to the listed chemical that is the subject of the action, and that,
8 based on that information, the person executing the certificate
9 believes there is a reasonable and meritorious case for the private
10 action. Factual information sufficient to establish the basis of the
11 certificate of merit, including the information identified in
12 paragraph (2) of subdivision (h), shall be attached to the certificate
13 of merit that is served on the Attorney General.

14 (2) Neither the Attorney General, a district attorney, a city
15 attorney, nor a prosecutor has commenced and is diligently
16 prosecuting an action against the violation.

17 (e) A person bringing an action in the public interest pursuant
18 to subdivision (d) and a person filing an action in which a violation
19 of this chapter is alleged shall notify the Attorney General that the
20 action has been filed. Neither this subdivision nor the procedures
21 provided in subdivisions (f) to (j), inclusive, affect the requirements
22 imposed by statute or a court decision in existence on January 1,
23 2002, concerning whether a person filing an action in which a
24 violation of this chapter is alleged is required to comply with the
25 requirements of subdivision (d).

26 (f) (1) A person filing an action in the public interest pursuant
27 to subdivision (d), a private person filing an action in which a
28 violation of this chapter is alleged, or a private person settling a
29 violation of this chapter alleged in a notice given pursuant to
30 paragraph (1) of subdivision (d), shall, after the action or violation
31 is subject either to a settlement or to a judgment, submit to the
32 Attorney General a reporting form that includes the results of that
33 settlement or judgment and the final disposition of the case, even
34 if dismissed. At the time of the filing of a judgment pursuant to
35 an action brought in the public interest pursuant to subdivision (d),
36 or an action brought by a private person in which a violation of
37 this chapter is alleged, the plaintiff shall file an affidavit verifying
38 that the report required by this subdivision has been accurately
39 completed and submitted to the Attorney General.

1 (2) A person bringing an action in the public interest pursuant
2 to subdivision (d), or a private person bringing an action in which
3 a violation of this chapter is alleged, shall, after the action is either
4 subject to a settlement, with or without court approval, or to a
5 judgment, submit to the Attorney General a report that includes
6 information on any corrective action being taken as a part of the
7 settlement or resolution of the action.

8 (3) The Attorney General shall develop a reporting form that
9 specifies the information that shall be reported, including, but not
10 limited to, for purposes of subdivision (e), the date the action was
11 filed, the nature of the relief sought, and for purposes of this
12 subdivision, the amount of the settlement or civil penalty assessed,
13 other financial terms of the settlement, and any other information
14 the Attorney General deems appropriate.

15 (4) If there is a settlement of an action brought by a person in
16 the public interest under subdivision (d), the plaintiff shall submit
17 the settlement, other than a voluntary dismissal in which no
18 consideration is received from the defendant, to the court for
19 approval upon noticed motion, and the court may approve the
20 settlement only if the court makes all of the following findings:

21 (A) The warning that is required by the settlement complies
22 with this chapter.

23 (B) The award of attorney's fees is reasonable under California
24 law.

25 (C) The penalty amount is reasonable based on the criteria set
26 forth in paragraph (2) of subdivision (b).

27 (5) The plaintiff subject to paragraph (4) has the burden of
28 producing evidence sufficient to sustain each required finding.
29 The plaintiff shall serve the motion and all supporting papers on
30 the Attorney General, who may appear and participate in a
31 proceeding without intervening in the case.

32 (6) Neither this subdivision nor the procedures provided in
33 subdivision (e) and subdivisions (g) to (j), inclusive, affect the
34 requirements imposed by statute or a court decision in existence
35 on January 1, 2002, concerning whether claims raised by a person
36 or public prosecutor not a party to the action are precluded by a
37 settlement approved by the court.

38 (g) The Attorney General shall maintain a record of the
39 information submitted pursuant to subdivisions (e) and (f) and
40 shall make this information available to the public.

1 (h) (1) Except as provided in paragraph (2), the basis for the
2 certificate of merit required by subdivision (d) is not discoverable.
3 However, nothing in this subdivision precludes the discovery of
4 information related to the certificate of merit if that information
5 is relevant to the subject matter of the action and is otherwise
6 discoverable, solely on the ground that it was used in support of
7 the certificate of merit.

8 (2) Upon the conclusion of an action brought pursuant to
9 subdivision (d) with respect to a defendant, if the trial court
10 determines that there was no actual or threatened exposure to a
11 listed chemical, the court may, upon the motion of that alleged
12 violator or upon the court's own motion, review the basis for the
13 belief of the person executing the certificate of merit, expressed
14 in the certificate of merit, that an exposure to a listed chemical had
15 occurred or was threatened. The information in the certificate of
16 merit, including the identity of the persons consulted with and
17 relied on by the certifier, and the facts, studies, or other data
18 reviewed by those persons, shall be disclosed to the court in an
19 in-camera proceeding at which the moving party shall not be
20 present. If the court finds that there was no credible factual basis
21 for the certifier's belief that an exposure to a listed chemical had
22 occurred or was threatened, then the action shall be deemed
23 frivolous within the meaning of Section 128.7 of the Code of Civil
24 Procedure. The court shall not find a factual basis credible on the
25 basis of a legal theory of liability that is frivolous within the
26 meaning of Section 128.7 of the Code of Civil Procedure.

27 (i) The Attorney General may provide the factual information
28 submitted to establish the basis of the certificate of merit on request
29 to a district attorney, city attorney, or prosecutor within whose
30 jurisdiction the violation is alleged to have occurred, or to any
31 other state or federal government agency, but in all other respects
32 the Attorney General shall maintain, and ensure that all recipients
33 maintain, the submitted information as confidential official
34 information to the full extent authorized in Section 1040 of the
35 Evidence Code.

36 (j) In an action brought by the Attorney General, a district
37 attorney, a city attorney, or a prosecutor pursuant to this chapter,
38 the Attorney General, district attorney, city attorney, or prosecutor
39 may seek and recover costs and attorney's fees on behalf of a party

1 who provides a notice pursuant to subdivision (d) and who renders
2 assistance in that action.

3 (k) Any person who serves a notice of alleged violation pursuant
4 to paragraph (1) of subdivision (d) for an exposure identified in
5 subparagraph (A),(B), or (C) of paragraph (1) of this subdivision
6 shall not file an action for that exposure against the alleged violator,
7 or recover from the alleged violator in a settlement any payment
8 in lieu of penalties or any reimbursement for costs and attorney's
9 fees, if all of the following conditions have been met:

10 (1) The notice given pursuant to paragraph (1) of subdivision
11 (d) was served on or after the effective date of the statute adding
12 this paragraph and alleges that the alleged violator failed to provide
13 clear and reasonable warning as required under Section 25249.6
14 regarding one or more of the following, and no other violation:

15 (A) An exposure to alcoholic ~~beverages, or to~~ *beverages that*
16 *are consumed on the alleged violator's premises to the extent*
17 *on-site consumption is permitted by law.*

18 (B) *An exposure to a chemical known to the state to cause cancer*
19 *or reproductive toxicity to the extent the chemical is formed on*
20 *the alleged violator's premises by necessary preparation of food*
21 *or beverages which are sold on the alleged violator's premises for*
22 *immediate consumption on or off the premises.*

23 ~~(B)~~

24 (C) An exposure to environmental tobacco smoke caused by
25 entry of persons (other than employees) on premises owned or
26 operated by the alleged violator where smoking is permitted at any
27 location on the premises.

28 ~~(C)~~

29 (D) An exposure to chemicals known to the state to cause cancer
30 or reproductive toxicity in engine exhaust, to the extent the
31 exposure occurs inside a facility owned or operated by the alleged
32 violator and primarily intended for parking noncommercial
33 vehicles.

34 (2) Within 14 days after service of the notice, the alleged violator
35 has done all of the following:

36 (A) Corrected the alleged violation.

37 (B) ~~Paid~~ *Agreed to pay* a civil penalty for the alleged violation
38 of Section 25496.6 in the amount of five hundred dollars (\$500),
39 to be adjusted ~~annually~~ *every 5 years* to reflect any increases in
40 the cost of living in California, as indicated by the annual average

1 of the California Consumer Price Index, per facility or premises
2 where the alleged violation occurred, of which 75 percent shall be
3 deposited in the Safe Drinking Water and Toxic Enforcement
4 Fund, and 25 percent shall be paid to the person that served the
5 notice as provided in Section 25249.12.

6 ~~(C) Served or Notified, in writing, the person that served the~~
7 ~~notice a written statement, signed under penalty of perjury, that~~
8 ~~fully describes the actions taken to correct the alleged violation~~
9 ~~and attaches a true and correct copy of any warning provided as~~
10 ~~part of such actions of the alleged violation, that the violation has~~
11 ~~been corrected. The written notice shall include the notice of~~
12 ~~compliance approved by the Judicial Council pursuant to~~
13 ~~paragraph (2) of subdivision (l) and a photograph or photocopy~~
14 ~~of the true and correct warning.~~

15 ~~(3) The alleged violator has not been served with a notice under~~
16 ~~paragraph (1) of subdivision (d) for an exposure identified in~~
17 ~~subparagraph (A), (B), or (C) of paragraph (1) of this subdivision~~
18 ~~within the previous five years for failure to provide clear and~~
19 ~~reasonable warning about the same exposure in the same facility~~
20 ~~or on the same premises.~~

21 ~~(3) The alleged violator shall deliver the civil penalty to the~~
22 ~~person that served the notice of the alleged violation within 30~~
23 ~~days of receipt of that notice, and the person that served the notice~~
24 ~~of violation shall remit the portion of the penalty due to the Safe~~
25 ~~Drinking Water and Toxic Enforcement Fund within 30 days of~~
26 ~~receipt of the funds from the alleged violator.~~

27 ~~(l) Any notice subject to subdivision (k) shall prominently~~
28 ~~include a clear and reasonable description of the terms of~~
29 ~~subdivision (k). The lead agency may prescribe specific language~~
30 ~~for inclusion in the notice that meets this requirement. both of the~~
31 ~~following:~~

32 ~~(1) A clear and reasonable description of the terms of~~
33 ~~subdivision (k), including a notification that an alleged violator~~
34 ~~may not be liable if the business has fewer than 10 employees. The~~
35 ~~lead agency may prescribe specific language for inclusion in the~~
36 ~~notice that meets this requirement.~~

37 ~~(2) A notice of compliance, approved by the Judicial Council,~~
38 ~~that includes the following statement: "I hereby swear, under~~
39 ~~penalty of perjury, that I have received a notice of violation of~~

1 *Section 25249.6 and have taken the following steps to comply with*
2 *Section 25249.7.”*

3 ~~(m) In the event of a dispute over whether an action brought~~
4 ~~pursuant to subdivision (d) is barred by subdivision (k), the alleged~~
5 ~~violation shall bear the burden of proving the applicability of~~
6 ~~subdivision (k) and its compliance with all requirements of~~
7 ~~paragraph (2) of subdivision (k). Upon the conclusion of an action~~
8 ~~brought pursuant to subdivision (d), if the trial court determines~~
9 ~~that the alleged violator has prevailed on the affirmative defense~~
10 ~~under subdivision (k), the court may, upon motion of that alleged~~
11 ~~violation or upon the court’s own motion, review the basis for the~~
12 ~~belief of the plaintiff that the action was not precluded by~~
13 ~~subdivision (k). If the court finds that there was no credible factual~~
14 ~~basis for the plaintiff’s belief that the action was not precluded by~~
15 ~~subdivision (k), then the action shall be deemed a violation of~~
16 ~~subdivision (b) of Section 128.7 of the Code of Civil Procedure.~~
17 ~~The court shall not find a factual basis credible if it is based on a~~
18 ~~legal theory of liability that is frivolous within the meaning of~~
19 ~~Section 128.5 of the Code of Civil Procedure.~~

20 *(m) An alleged violator may satisfy the conditions set forth in*
21 *subdivision (k) only one time for a violation arising from the same*
22 *exposure in the same facility or on the same premises.*

23 (n) Nothing in subdivision (k) shall prevent the Attorney
24 General, a district attorney, a city attorney, or a prosecutor in whose
25 jurisdiction the violation is alleged to have occurred from filing
26 an action pursuant to subdivision (c) against an alleged violator.
27 In any such action, the amount of any civil penalty for a violation
28 shall be reduced to reflect any payment made by the alleged
29 violator for the same alleged violation pursuant to subparagraph
30 (B) of paragraph (2) of subdivision (k).

31 SEC. 2. The Legislature finds and declares that this enactment
32 furthers the purposes of the Safe Drinking Water and Toxic
33 Enforcement Act of 1986 (Chapter 6.6 (commencing with Section
34 25249.5) of Division 20 of the Health and Safety Code).

35 SEC. 3. Specifically, the Legislature finds and declares that
36 subdivision (k) of Section 25249.7 is necessary to further the
37 purposes of Section 25249.6 of the Health and Safety Code, in
38 terms of speed of compliance and reasonableness as contemplated
39 by that section. To ensure prompt compliance with the Safe
40 Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6

1 (commencing with Section 25249.5) of Division 20 of the Health
2 and Safety Code), paragraph (2) of subdivision (k) of Section
3 25249.7 of the Health and Safety Code shall be independent and
4 severable from the rest of this enactment.

5 SEC. 4. The Legislature further finds and declares that
6 subdivisions (k) to (m), inclusive, of Section 25249.7 of the Health
7 and Safety Code are necessary to further the purposes of the intent
8 of fairness contemplated by the Safe Drinking Water and Toxic
9 Enforcement Act of 1986 (Chapter 6.6 (commencing with Section
10 25249.5) of Division 20 of the Health and Safety Code), as evinced
11 by the fairness factors outlined in Section 25249.10 of the Health
12 and Safety Code.

13 SEC. 5. This act is an urgency statute necessary for the
14 immediate preservation of the public peace, health, or safety within
15 the meaning of Article IV of the Constitution and shall go into
16 immediate effect. The facts constituting the necessity are:

17 In order to avoid unnecessary litigation and to facilitate
18 compliance with the Safe Drinking Water and Toxic Enforcement
19 Act of 1986, it is necessary that this act take effect immediately.

20 SEC. 6. No reimbursement is required by this act pursuant to
21 Section 6 of Article XIII B of the California Constitution because
22 the only costs that may be incurred by a local agency or school
23 district will be incurred because this act creates a new crime or
24 infraction, eliminates a crime or infraction, or changes the penalty
25 for a crime or infraction, within the meaning of Section 17556 of
26 the Government Code, or changes the definition of a crime within
27 the meaning of Section 6 of Article XIII B of the California
28 Constitution.